BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: RII PLASTERING, INC. dba Quality Plastering Company 21778 Temescal Canyon Road Corona, CA 91719 Employer	Docket No. 00-R3D1-4250 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed in the above entitled matter by RII Plastering, Inc. dba Quality Plastering Company (Employer) under submission, makes the following decision after reconsideration.

JURISDICTION

On November 1, 2000, a representative of the Division of Occupational Safety and Health (the Division) conducted a referral inspection at a place of employment maintained by Employer at NW corner of Central Park at View Park, Irvine, California (the site).

On November 3, 2000, the Division issued a citation to Employer alleging a serious violation of sections 1637(n)(1) [unobstructed access] of the occupational safety and health standards and orders found in Title 8, California Code of Regulations.[1] The Division proposed a civil penalty in the amount of $8,435 for the violation.

Employer filed a timely appeal contesting the existence and classification of the alleged violation and the reasonableness of both the abatement requirements and the amount of the proposed penalty, as well as raising a number of affirmative defenses.

A hearing was held before Jack L. Hesson, Administrative Law Judge (ALJ) for the Board, in Anaheim, California. Ron Medeiros, Attorney, represented Employer. Thurman Johns, Cal/OSHA Safety Engineer,

[1] Unless otherwise specified all references are to sections of Title 8, California Code of Regulations.

represented the Division. On November 21, 2001, the ALJ issued a decision denying Employer's appeal.

On December 21, 2001, Employer filed a petition for reconsideration challenging the civil penalty on grounds that the Division did not provide any evidence in support of the proposed penalty which the ALJ assessed against Employer. No answer was filed by the Division. On February 8, 2002, the Board issued an order taking the petition under submission and stayed the decision of the ALJ.[2]

EVIDENCE

Thurman Johns (Johns), the inspecting officer for the Division, testified that on November 1, 2000, he was driving by the site and observed an employee climbing up the outside of a metal scaffolding. The site consisted of numerous apartment buildings that were being constructed in several stages. He stopped to inspect the scaffolding but the employees on the scaffolding spoke Spanish and there was not a supervisor present. Johns made contact with representatives of the general contractor who gave permission for an inspection, and identified Employer, RII Plastering, as the sub-contractor using the scaffolding. Employer's supervisor was at another location at the site so the representatives of the general contractor contacted the supervisor, Abel Armendariz, and introduced him to the inspector. Abel Armendariz then accompanied Johns while he inspected the scaffolding.

Johns introduced into evidence a photograph of the scaffolding that he observed the employee climbing (Exhibit 2). The photograph depicts three employees on the scaffolding. Johns identified the employee that he observed climbing as the employee depicted to the left of the other employees. He walked around that building and could not find a ladder or another means of safe access. He stated that he cited Employer for a serious violation of section 1637(n)(1) because the employees were not provided with a safe and unobstructed means to access the work platforms on the scaffold.

Johns testified that the photographs depict employees working at heights of up to 16 ½ feet. He has personally been involved in the investigation of at least three cases where falls from that height resulted in death or serious injury. He stated that the alleged violation was cited as serious because a fall from such a height was likely to result in serious injury.

Employer did not present oral or documentary evidence.

ISSUE

[2] In the Order Taking Petition for Reconsideration Under Submission the docket number was incorrectly listed as 00-R3D1-4249 through 4252 rather than the correct number of 00-R3D1-4250.

Was the civil penalty supported by evidence presented by the Division?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

Employer contends in its petition for reconsideration that:

1. The Board, acting through its administrative law judge, Jack Hesson, acted without or in excess of its powers in issuing the subject Decision, and
2. The evidence does not justify the findings of fact, and
3. The findings of fact do not support the decision.

The Division did not file a response to Employer's petition. In the decision, the ALJ concluded that:

> The Division failed to provide testimony concerning the proposed civil penalties, but in the absence of information establishing that the calculations are inconsistent with the regulations they presumed to be reasonable.

Employer submits that when the amount of a penalty is challenged pursuant to Labor Code section 6600 (as in this case), the Division must offer some evidence in support of those factors which are included in the penalty equation.

In *Dye & Wash Technology*, Cal/0SHA App. 00-2327, Denial of Petition for Reconsideration (July 11, 2001), the Board determined that civil penalties calculated "in accordance with the penalty setting regulations promulgated by the Director of Industrial Relations (§§ 333-336)" are "presumptively reasonable."

As noted by Employer, *Dye & Wash Technology, supra*, did not relieve the Division of its duty to offer evidence in support of its determination that proposed civil penalties are calculated in accordance with Title 8, California Code of Regulations sections 333 through 336. The Board requires proof that a proposed penalty is calculated in accordance with the Director's penalty setting regulations. (See *Townsend & Schmidt Masonry*, Cal/OSHA App. 78-1049, Decision After Reconsideration (Aug. 26, 1980); *Gal Concrete Construction Co.,* Cal/OSHA App. 89-317, Decision After Reconsideration (Sept. 27, 1990).)

We disagree with Employer's contention that, if no evidence is submitted as to how the Division arrived at the calculation, the resulting penalty must be zero. As we recently observed, assessment of civil penalties under the

California Occupational Safety and Health Act of 1973[3] (the Act) must be viewed with due consideration of the objectives of the Act and the deterrent purposes of the penalty citation system within the Act. (See, *Eagle Environmental, Inc.* Cal/OSHA App. 98-1640, Decision After Reconsideration (Oct. 19, 2001).) The primary objective of the Act in promoting safety and health at the workplace includes affording deference to penalties calculated in accordance with presumptively valid penalty-setting regulations. Vacating a civil penalty based upon the Division's failure to produce any evidence to substantiate the proposed penalty would not further these considerations.

Accordingly, where the Division does not provide evidence to support its proposed penalty, it is appropriate that Employer be given the maximum credits and adjustments provided under the penalty-setting regulations such that the minimum penalty provided under the regulations for the established violation is assessed.[4]

In this case, the Division established that there was a serious violation. Therefore, according to section 336(b)(1) the base penalty is $18,000. Since the Division presented no evidence regarding extent, or likelihood, the lowest penalty amount provided for by the Director's regulations will be utilized and a 25% reduction of the base penalty will be allowed for both extent and likelihood leaving a gravity based penalty of $9,000.

Since the Division offered no evidence as to the size of the business, the regulations provide that a business with 10 or fewer employees is entitled to have 40% of the gravity base penalty subtracted. (§ 336(d)(1).)

The Division also did not offer any evidence as to what Good Faith credit should be applied. The maximum Good Faith credit is 30%. (§ 336(d)(2)) There was also no evidence regarding Employer's history of previous violations and under section 336(d)(3) Employer is entitled to have 10% credit for history. These credits add up to 80%. Thus, in view of the lack of evidence in this case, Employer is entitled to have 80% of the gravity based penalty of $9,000 subtracted for an adjusted penalty of $1,800.

Under section 336(4)(B), Employer is entitled to an additional adjustment of 50% unless the exceptions listed under section 336(e) et seq. are established. Since the Division did not establish any of the exceptions listed under section 336(e) or (f), et seq. we are compelled to reduce the adjusted penalty by 50% for a total penalty of $900.

DECISION AFTER RECONSIDERATION

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[3] Labor Code sections 6300 et seq.

[4] Allowing the maximum credits only applies to those factors under the penalty-setting regulations where no evidence is presented by the Division.

The Board affirms the ALJ's decision and reduces the assessed civil penalty to $900.

MARCY V. SAUNDERS, Member
GERALD PAYTON O'HARA, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: October 21, 2003